SUPREME COURT

STATE OF MICHIGAN

IN THE SUPREME COURT

DEC 2002

Appeal from the Court of Appeals
Hilda R. Gage, Kathleen Jansen, and Peter D. O'Connell, JJ.

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

Docket No. 120515

TERRY LYNN KATT,

Defendant-Appellant.
_____/

BRIEF ON APPEAL – PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The statement of jurisdiction in defendant's brief is correct and complete.

COUNTERSTATEMENT OF QUESTION PRESENTED

DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION IN ADMITTING DESI DILLON'S STATEMENTS TO ANGELA BOWMAN UNDER MRE 803(24) BECAUSE THE STATEMENTS MET THE REQUIREMENTS FOR ADMISSION UNDER THAT RULE?

Plaintiff-Appellee answers: "YES"

Defendant-Appellant answers: "NO"

SUMMARY OF ARGUMENT

Both the trial court and the Court of Appeals correctly determined that seven-year-old Desi Dillon's statements to Children's Protective Services specialist Angela Bowman met the requirements for admissibility under the "residual" hearsay exception embodied in MRE 803(24). In particular, Desi's statements met those requirements that defendant disputes before this Court.

First, the statements were not specifically covered by another hearsay exception. Defendant's claim that the "tender years" exception of MRE 803A "covers" statements made by children about sexual abuse, so that such statements can never be admissible under the residual exception, is unsound. Most federal circuits have rejected this construction of their own parallel hearsay rules, sometimes called the "near-miss" rule. The "near-miss" theory is at odds with the language and purpose of the rules of evidence, contradicts logic, would prove unworkable, and would detract from consistency and predictability in evidentiary rulings. Moreover, even under the "near-miss" rule, a statement's proximity to the tender years exception would not disqualify it from admission under MRE 803(24).

Second, Desi's statements to Bowman contained circumstantial guarantees of trustworthiness equivalent to those reflected in the firmly rooted hearsay exceptions. Both defendant and his counsel stipulated before trial that these statements were sufficiently reliable under MRE 803(24). Even if that stipulation is ignored, the statements were voluntary, spontaneous, and internally consistent. Desi spoke in detail, with personal knowledge of the events he described, with terminology unexpected from a child his age, and with no apparent motive for fabrication. Contrary

to defendant's assertions, there is no evidence that Desi's statements were influenced by anyone else.

Third, Desi's statements to Bowman were more probative regarding defendant's abuse of Desi and Amanda than any other evidence the prosecutor could have procured through reasonable efforts. Defendant's suggestion that Desi's statement to Grace Grissom might have been more probative is factually unsupported. And in any event, that statement was inadmissible, and could therefore not have been procured for use at trial.

Fourth, although defendant does not specifically discuss this requirement, the admission of Desi's statements under MRE 803(24) best served the general purposes of the rules of evidence and the interests of justice. The trial court's ruling allowed the jury to hear highly probative and reliable evidence.

COUNTERSTATEMENT OF FACTS

On June 3, 1999, a jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b, before Berrien County Trial Court Judge Paul L. Maloney (Tr III,[1] 675-676). These convictions stemmed from defendant's repeated sexual molestation of two young children, Desi and Amanda Dillon, who lived in the same house with defendant. Judge Maloney sentenced defendant to three concurrent life sentences, to be served consecutively to defendant's prior sentence because he was on parole at the time of these offenses (S Tr, 10). The Court of Appeals affirmed defendant's convictions in a published opinion, but remanded for correction of the judgment of sentence.[2] People v Katt, 248 Mich App 282; 639 NW2d 815 (2001). This Court granted defendant's application for leave to appeal, "limited to the issue of whether the trial judge erred in admitting testimony from the protective services worker under MRE 803(24)" (Order, Supreme Court No. 120515, 7/02/02).

Because the facts underlying the prosecutor's motion to admit evidence under MRE 803(24) and its resolution are central to the issue before this Court, the People present them in detail before stating the facts concerning the trial.

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[1] "Tr" refers to the trial transcript and is followed by the appropriate volume number in Roman numerals. "PE Tr" refers to the preliminary examination transcript. "S Tr" refers to the sentencing transcript. "M Tr" refers to one of several motion transcripts, identified in each case by its date. Citations to the appellant's and appellee's appendices are followed by "a" and "b," respectively.

[2] The judgment of sentence erroneously reflected four life sentences instead of three. Katt, 248 Mich App at 311-312.

The motion for admission of evidence under MRE 803(24)

Before trial, the prosecutor moved for the admission of Desi's statements to Children's Protective Services specialist Angela Bowman regarding defendant's sexual abuse of him and of Amanda (20a-21a; 29b-36b). The prosecutor conceded that these statements were not admissible under the "tender years" exception in MRE 803A[3]: That rule allows for the admission of only a child's first statement about sexual abuse, and Desi had previously spoken to his mother, Grace Grissom, in response to Grissom's questioning (22a).

The prosecutor argued, however, that Desi's statements to Bowman were admissible under MRE 803(24), sometimes called the "residual" exception (31b-36b). MRE 803(24) provides that a statement meeting the following requirements is not excluded by the hearsay rule, regardless of the availability of the declarant as a witness:

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[3] MRE 803A provides, in pertinent part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[4]

Bowman testified at a hearing on the prosecutor's motion. Bowman explained that at the time of her interview with Desi, she was a Children's Protective Services specialist. It was her job to investigate child neglect and abuse cases, determine the risk to children with a given caretaker, and arrange for out-of-home placement if necessary. Bowman had a Bachelor of Science degree in psychology. She had undergone extensive on-the-job training through the State of Michigan (37b). Bowman worked in Children's Services for twelve years, about ten of which were with Protective Services. She had extensive experience interviewing young children and specific training in that area (37b-38b). She had interviewed thousands of children over the years (38b). Bowman stated that when interviewing children less than eight years old, she made a point not to use leading questions (38b-39b).

Bowman testified that on October 27, 1998, she went to Desi's school to interview him in response to an anonymous referral received by Protective Services the previous day (39b-40b).[5] The caller had alleged that Grissom beat the children with a wooden spoon (37a). When Bowman began the interview, defendant's name meant nothing to her (41b). Her primary goal was to determine whether the anonymous

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[4] MRE 804(b)(7) contains identical language, but requires in addition that the declarant be unavailable as a witness.

[5] Eventually, defendant admitted to being the anonymous caller (Tr III, 587-589).

allegations were true, whether there was an ongoing risk of abuse, what intervention might be needed to protect the children, and the motive for the allegations (40b).

Once Bowman and Desi were alone, Bowman introduced herself and identified herself as a Protective Services worker. She explained that she was there to help children and that Desi was not in trouble. It was a very casual interaction (42b). Bowman began with general questions like "Who lives in your home? Do you have brothers and sisters?" Then she asked something like, "What happens at home if you get in trouble? What does your mom do?" (43b). Desi said his mother put him in timeout, placing him in a chair, and that she might verbally scold him. Bowman asked if Desi were ever hit with an object, and Desi said sometimes his mother had hit him with a belt. Asked specifically about a wooden spoon, Desi said his mother might have hit him with one once. Bowman examined Desi's extremities and trunk; they bore no physical indications of injury (44b).

When Bowman was asking about Desi's household members, Desi identified "Uncle Terry." Then he volunteered that Uncle Terry did "nasty stuff" to him and his sister, Amanda. Desi said, "Uncle Terry does nasty stuff to me and he's going to jail" (47a). Although Bowman had an idea what Desi might mean by "nasty stuff," she did not say anything specific to him, but coaxed him a couple of times to explain what he meant (48a).

Desi told Bowman that defendant would come into the room that Desi and Amanda shared and take off his (defendant's) clothes.[6] Defendant would get on top of

[6] It is not entirely clear from Bowman's testimony whether she was saying that defendant also took off Desi's clothes. At trial, Bowman clarified that Desi said defendant removed Desi's and Amanda's clothes as well (140a).

Desi. Bowman asked Desi to demonstrate what he was describing. Desi put his hand on the table and said that defendant would get on top of him and "go up and down." Desi said he and defendant were facing each other (48a; 45b). Desi described the up-and-down motion as "hunching" (49a).

Desi also told Bowman that defendant put his mouth on Desi's "ding-ding." Desi demonstrated this by putting his finger in his mouth and pulling it in and out. Bowman asked Desi to point to his "ding-ding," and Desi pointed to his genital area. Desi said defendant would put his mouth on Desi's "tits." Asked where that was, Desi pulled up his shirt and pointed to his "tits." Desi said defendant put his tongue in Desi's mouth, and that the tongue would go in and out (45b). Defendant made Desi put his mouth on defendant's "ding-ding" (49a).

Desi said defendant also "hunched" on Amanda. Defendant took off Amanda's clothes and got into bed with her. Desi saw defendant put his mouth on Amanda's "couchie" and put his tongue in it. Defendant also put his finger in Amanda's "butt," then took out the finger and sucked it (49a). Defendant told Amanda to "suck his dick" (Desi said "dick" was defendant's word) (50a).

Desi said these things had happened "a hundred times." Bowman did not take this literally (49a).[7]

Bowman testified that Desi was very clear in what he said. After each incident that Desi disclosed, Bowman asked him about it again. When the interview was done,

[7] At trial, Bowman explained that her reason for not taking this statement literally was Desi's young age (141a).

Bowman asked Desi to tell her about it again. Thus, Desi repeated everything to Bowman at least three times. He never changed his story (50a).

After the interview, Bowman contacted law enforcement. Then she contacted Grissom (51a). Grissom told Bowman she did not believe the allegations (51a; 46b).

Both defendant and his counsel stipulated that Desi's statements to Bowman carried sufficient guarantees of trustworthiness to be admissible under MRE 803(24). This happened as follows. When the prosecutor began to ask Bowman about Desi's statements regarding defendant's sexual abuse of Desi and Amanda, Jay Schultz, defendant's trial counsel, interrupted. Schultz offered to stipulate that "Desi made statements to [Bowman] implicating the defendant, Mr. Katt, . . . with respect to sexual abuse charge [sic]. Our objections to that evidence are not factual objections but are legal objections" (44b; 40a). After discussing defendant's legal objections, the court asked:

> Well, if I understand what you just said, Mr. Schultz, you are not contesting the circumstances under which the statement by Desi given to Miss Bowman was taken; in other words, you have no assertion that it was as a result of improper questioning by Miss Bowman in terms of leading nature of the questions or anything like that. You agree that, if I understood Miss Bowman's questioning before we started with your statement, that this was, more or less, a situation where Desi started talking about this, unprompted by any question about Mr. Katt by Miss Bowman. You agree with all that? [41a-42a.]

Schultz said yes, adding, "I have no good faith reason to suspect the circumstances of that" (42a). Both defendant and Schultz denied any claim that Bowman's testimony would not accurately reflect what Desi said to her (42a, 44a).

The prosecutor suggested that Bowman's testimony at the hearing would be necessary for the court to judge whether Desi's statements contained sufficient

guarantees of trustworthiness to be admissible (43a). The court stated it understood Schultz to be stipulating to the trustworthiness of the statements, but took steps to clarify that point:

> THE COURT: All right. And to the extent that the Court needs to make a finding on the trustworthiness of the statement, you're not contesting that?
>
> THE DEFENDANT: No.
>
> * * *
>
> THE COURT: The trustworthiness of the circumstances under which Desi made a statement that Miss Hebets [the prosecutor] seeks to admit into evidence, that's the issue. There is no contest on that?
>
> MR. SCHULTZ: No, not as to the –
>
> THE COURT: All right.
>
> MR. SCHULTZ: – circumstance.
>
> THE COURT: Because there could be an attack that Miss Bowman lead [sic] Desi to –
>
> MR. SCHULTZ: No.
>
> THE COURT: – say what – to say what he said and that therefore it's untr – untrustworthy for that reason. You're not –
>
> MR. SCHULTZ: We have –
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> THE COURT: – suggesting –
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> MR. SCHULTZ: – no reason to believe that, judge.
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> THE COURT: You have no reason to believe that, all right. Well, I – the Court's going to interpret that as a – to the extent that the Court must make a trustworthiness finding, the Court is going to interpret that, and I want everybody to understand that I'm going to interpret that to mean, Mr. Schultz, that – and Mr. Katt, that you're stipulating that this statement is trustworthy, for un – under the – under the hearsay analysis that I have to do. Is that understood?

MR. SCHULTZ: Yes, sir.

THE COURT: Mr. Katt?

THE DEFENDANT: Yes. [44a-46a.]

Defendant argued, however, that Desi's statements to Bowman failed to meet the requirement of MRE 803(24) that the statement not be specifically covered by another hearsay exception. Defendant claimed that because MRE 803A addressed children's statements regarding sexual abuse and provided for the admission of only the first corroborative statement, a later corroborative statement could not be introduced under MRE 803(24) (30a-32a, 40a; 52b-53b). Defendant also questioned whether Desi's statements to Bowman were more probative than his statement to Grissom or his anticipated trial testimony (40a-41a).

The prosecutor had previously indicated that Desi's statement to Grissom was very brief, and did not contain much detail:

> On or about October 22nd or 23rd, the victim's mother, Grace Grissom, awoke during the night and saw Amanda standing outside her bedroom door holding her panties in her hand. She also noticed the defendant walking down the hallway into his room. Amanda told her that "Terry took off" her panties. The following day, Mrs. Grissom spoke with Desi. He told her that the defendant pulled down his pants and sucked on his "pee pee." He did not go into additional detail, and Mrs. Grissom did not ask him anything more. [30b.]

Defendant did not dispute this description of Desi's statement to Grissom.

The prosecutor also noted that Desi's earlier statement to Grissom was not admissible under the tender years exception because it was not spontaneous, as MRE 803A requires. Instead, Grissom said she had sought out Desi and asked him specifically what defendant had done to him. Thus, Grissom's testimony was not

evidence that the prosecutor could "procure" under MRE 803(24) (48b-49b, 51b-52b). Defendant asked the prosecutor to clarify this argument, but did not contest it (51b).

The prosecutor further observed that Desi's testimony at defendant's preliminary examination had not been very clear and had relied heavily on the use of anatomical dolls (1b-28b, 50b). (Indeed, Desi had admitted he was frightened in court (6b), and he often became distracted (1b-28b.) Thus, the prosecutor argued, Desi's statements to Bowman contained far more detail than Desi had given at the preliminary examination or that he could be expected to give at trial (50b-51b).

The trial court found that the proffered evidence carried sufficient circumstantial guarantees of trustworthiness for admissibility (54b; 58a-60a). The court made extensive findings on this point:

> First is the spontaneity of Desi's first statements to Miss Bowman. Recall – the Court's heard the testimony, that Miss Bowman was not there to talk about sexual abuse, she was there to talk about physical abuse. I would also note that as far as this Court's record is concerned, Miss Grissom did not know that her child was going to be interviewed on October 27. Accordingly, there doesn't appear to be anything on the record here which would establish that somehow Desi was prepped by somebody to mouth sentences to Miss Bowman that were not true. Miss Bowman first inquired of Desi about physical abuse. Then, Desi, and in this Court's opinion this is important, not in response to any questioning by Miss Bowman regarding sexual abuse, spontaneously spoke about abuse – sexual abuse by the defendant. It's clear that Desi spoke from his personal knowledge. And, as her duty as a protective service worker, Miss Bowman inquired further. Now, Miss Bowman's qualifications to interview children were obvious from the record. She is aware of how to inter – the Court is totally satisfied that she is aware of how to interview children. She testified that she avoided leading questions and avoided other pitfalls of questioning of young children. And the Court finds that she was totally aware how to get truthful information from the – from Desi Dillon. The Court finds that the record and the dynamics of this exchange between Miss Bowman and Desi provided a form [sic – forum?] that an accurate statement would be uttered by Desi. The Court finds no plan of falsification by Desi under the circumstances in the record that I have before me, and no – I do find a lack of motive to fabricate on the child's

> part. The Court also notes that the – that Miss Bowman testified, and I believe her testimony, she had no preconceived notion that anything of a sexual nature occurred when she walked into that room on October 27, '97 [sic]. Indeed, as I've stated before, she was there to talk to Desi about physical abuse.
>
> Finally, the receipt of this evidence provides, in the Court's opinion, the mo – the fullest record in compliance with the second subsection of 803.24 as to what happened. And, indeed, I think the prosecutor has a very substantial argument that the receipt of this evidence by Miss Bowman provides the most trustworthy statement by Desi of what happened. [58a-60a.]

The court further found that the evidence was offered as evidence of a material fact (M Tr, 5/13/99, 141-142), and that it was more probative than any other evidence the prosecutor could provide (60a):

> . . . . [T]he Court recognizes that defendant has asserted repeatedly that Miss Grissom put Desi up to these allegations and that therefore Desi's in-court testimony is suspect, both at the pre – at the preliminary examination, as well as the trial, because of Miss Grissom's motives. However, the Court would note that the proffered testimony of Miss Bowman is very early in the timeline of this case and formed the basis, based on the record that I have before me, of the criminal investigation which resulted in the charges against the defendant, and, with the exception of what the record shows I think were brief conversations by Desi of – with other people was the closest in time to the alleged events. And accordingly, I find that this evidence is more probative than other evidence that the prosecutor could provide in terms of the detailed nature of the testimony. And in that regard, I cite [United States v Grooms, 978 F2d 425 (CA 8, 1992).]

The court rejected defendant's argument that because the evidence did not meet the requirements of admissibility under MRE 803A, it was therefore inadmissible under MRE 803(24) (56a-58a). The court cited In re Snyder, 223 Mich App 85, 91-92; 566 NW2d 18 (1997), a case involving the termination of parental rights in which the Court of Appeals, after noting that certain hearsay was not admissible under MRE 803A, looked to MCR 5.972(C)(2) as an alternate basis for admission. The trial court saw this

as authority for the more general proposition that hearsay inadmissible under MRE 803A might be eligible for admission under another rule (56a-58a). The court ruled that the prosecutor could introduce evidence of Desi's statements to Bowman (61a).

The trial testimony

At the beginning of August, 1998, Grace Grissom was living in Kentucky with her son, Desi Dillon, then six years old, and her daughter, Amanda Dillon, then five (78a). Her ex-husband, David Thimell, was living in a house in St. Joseph, Berrien County, Michigan. Defendant, Thimell's friend, was living there as well. In mid-August, at Thimell's request, Grissom and her children moved from Kentucky into Thimell's house (78a, 86a, 114a; Tr II, 214-215). Shortly thereafter, John Kiste, another friend of Thimell, moved in from Florida, and Grissom's brother, Charles Archer, moved in from Kentucky (Tr I, 102; 115a-116a, 148a-149a). Kiste, Archer, and defendant each had his own bedroom. Grissom and Thimell shared a bedroom, as did Desi and Amanda (Tr I, 102-103; 116a).

Amanda Dillon testified that defendant woke her up and took her and Desi into his bedroom (87a). Defendant removed Amanda's clothing and his own (88a-89a). Defendant put his "dick" in Amanda's "coo-coo," which she indicated was where she went to the bathroom (87a-88a). Defendant also "put his dick in my butt" (90a). Amanda used dolls to illustrate defendant's "hunching" (moving back and forth) on her (90a-92a). She also used the dolls to show that defendant had placed his fingers in her vaginal area (93a). Defendant also took off Desi's clothes and "put his dick in Desi . . . . in his butt" (89a, 93a-94a). Amanda used the dolls to indicate penetration of Desi's

anus with defendant's penis and with defendant's finger (Tr I, 158-160). Amanda said this happened five times, and always when it was dark out and no one else was awake (96a). Later, she said it happened ten times (97a). Amanda acknowledged that she had said previously that the abuse had occurred in her and Desi's bedroom (98a).

Desi Dillon testified that defendant woke him and Amanda and took them into his bedroom, which was next to their own (Tr I, 180-182). There defendant "did sick stuff to us" (103a). Desi did not want to elaborate because he was scared of defendant, who was "mean" (103a-104a). Gradually, however, he revealed that defendant took off Amanda's, Desi's and his own clothing (105a). Defendant "put his finger in our bottom" (both Desi's and Amanda's) (106a-107a). Using the dolls, Desi showed how defendant had placed his mouth on Desi's penis (107a). Desi said defendant also put his "wee-wee" (penis) in Desi's mouth and in Amanda's mouth (107a-108a). Desi said defendant "did something" to Amanda while Desi was in the room. He did not want to tell what it was (57b).

Desi testified that this behavior happened "a lot of times." He thought it had happened 100 times, but never twice in the same night (109a). He said it seemed to happen every night they had lived in the house with defendant (110a).

Grissom testified that one night in late October, 1998, she got up at about 3:00 a.m. to use the bathroom (Tr I, 104-105). She saw Amanda standing in her bedroom doorway with her panties in her hand. Defendant was going into his bedroom (79a). When Grissom asked what Amanda was doing up, Amanda said defendant had gotten her up and had put her down in the bed just as Grissom had gotten up (80a). Grissom told the children that if defendant came back into their room, they were to kick, hit, bite,

and scream for Grissom (81a). When Grissom relayed what she had learned to Thimell, he replied that defendant would not have done anything like that (80a).

Barton Comstock, a pediatrician, examined the children on October 30, 1998 (125a). Their bodies did not bear evidence of sexual abuse, but this absence of physical evidence was inconclusive regarding whether sexual abuse had occurred (126a-128a).

Bowman's trial testimony about her interview with Desi and Desi's statements to her was much the same as it had been in the motion hearing (132a-145a; 58b). Bowman noted that Desi's terminology changed when he referred to the children's bodies rather than defendant's (138a-139a).

Robin Zollar, an expert in the area of child sexual abuse, explained that there were various reasons why a sexually abused child might not report the abuse immediately (Tr II, 362-365). A child might be less likely to do so if the perpetrator was still living in the same house with the child. Further, it was common for an abused child to seek out the abuser at other times; the child might like the person despite the abuse. Id., 365. Zollar also testified that it was uncommon for a five-year-old or seven-year-old to fantasize about sexual experiences, and that children of these ages could distinguish between fantasy and reality. Id., 366-367.

Zollar stated that children of these ages were not always accurate about the number of times something had happened (Tr II, 370, 373). A child might also change his or her account of the room in which an incident occurred, depending on the identifying factors of the room or other variables; this did not mean the incident had not

occurred.[8] Id., 373. It was also common for a child to disclose different incidents at different times or to different persons; disclosure was not a single event, but a process that developed with trust. Id., 376.

Zollar acknowledged that five- and seven-year-olds were suggestible, and that it was possible to make them repeat suggestions of sexual abuse (Tr II, 377-378, 405). A child doing this, however, usually did not give as consistent an account as one relating an actual experience, unless the child had been thoroughly coached. Id., 378, 405-406. Coaching, however, could usually be detected by the scripted nature of the account and the child's inability to give details he or she should know. Id., 378-379, 406. Further, Zollar had conducted assessments on Amanda and Desi. Neither child was sophisticated for his or her age; in fact, both were "behind" in that regard. Id., 408.

Defendant's theory of the case was that Grissom, who he alleged physically abused her children, had coerced them into reporting Grissom's fabrications of defendant's sexual abuse. Both children admitted that Grissom sometimes hit or spanked them with a belt or a wooden spoon, but denied that Grissom had told them what to say about defendant (99a, 102a, 108a, 112a; 55b, 56b). Grissom herself first denied, then admitted punishing the children in ways that left marks on them (Tr I, 133-138). But she had not used the children to get back at defendant (83a).

Grissom's alleged motive for having defendant falsely accused was revenge against defendant, who had reported Grissom's and Kiste's romantic liaisons to Thimell

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[8] Zollar acknowledged, however, that some of the factors present in this case, such as the children's inconsistency about what room the abuse occurred in, the conflict between Grissom and defendant, and Grissom's alleged physical abuse of the children, would affect her evaluation of the truthfulness of the children's allegations (Tr II, 382-385, 402-404).

sometime in September, (Tr I, 109-110, 232; Tr III, 551-552). This led to a confrontation among Thimell, Grissom, Kiste, and defendant (Tr I, 233; Tr III, 553-554). Thimell's and Grissom's relationship was affected by this confrontation (Tr I, 238-239). Grissom admitted that she was angry at defendant about this. Id., 111. Grissom had allegedly threatened to get even with defendant. Id., 235; Tr III, 554.

Defendant testified that he had not performed any of the alleged sexual acts on Desi and Amanda (169a). When defense counsel asked defendant why the jury should believe him, defendant said, "I did not do this. It's not in my nature to go around and have sex with children" (169a-170a).

On cross-examination, defendant admitted that in September, 1997, he had been charged with CSC 2 in a case involving Casey Dawson, a nine-year-old boy whom defendant had baby-sat (176a, 178a-179a). Defendant had been accused of getting into the bathtub with Casey and grabbing his penis; he continued to deny having done this (177a). The prosecution had dismissed the case (178a-179a). On rebuttal, however, Casey Dawson testified that defendant had, in fact, taken a bath with Casey and touched Casey's "privates" (182a-184a).

ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING DESI DILLON'S STATEMENTS TO ANGELA BOWMAN UNDER MRE 803(24) BECAUSE THE STATEMENTS MET THE REQUIREMENTS FOR ADMISSION UNDER THAT RULE.

Standard of Review. The admission of evidence is reviewed for an abuse of discretion. People v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999). When the decision involves a preliminary question of law, however, this Court reviews such questions de novo. Id.

Defendant has waived the issue of whether Desi's statements to Bowman were sufficiently trustworthy to be admitted under MRE 803(24). Thus, any error has been extinguished. People v Carter, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

As shown in the People's statement of facts, the trial court took great care to render a decision on the prosecutor's motion that was thoughtful, complete, and legally and factually correct. Nonetheless, defendant challenges the admission of Desi's statements to Angela Bowman on three grounds. First, defendant claims that Desi's statements were "specifically covered" by (although not admissible under) MRE 803A, the "tender years" exception. Second, defendant contends that Desi's statements did not have sufficient guarantees of trustworthiness. Third, defendant asserts that Desi's statements to Bowman were not as probative as his statement to Grissom.

The discussion below will show that each of defendant's claims is unfounded. MRE 803A was not intended to be the only hearsay exception under which a child's statement about sexual abuse could be admitted. Nor should the application of MRE 803(24) be restricted, as defendant suggests, to statements that are utterly unlike those admitted under other exceptions. The trial court correctly found that Desi's statements

to Bowman bore many guarantees of trustworthiness – and in any event, defendant has waived this argument. And the record holds no support for defendant's allegation that Desi's brief statement to Grissom would have been more probative than his detailed statements to Bowman about the sexual abuse.

A. Desi's statements to Bowman were not specifically covered by any of the hearsay exceptions in MRE 803(1)-(23).

MRE 803(24) applies, by its terms, to a statement "not specifically covered by any of the foregoing exceptions." The tender years exception is not a "foregoing" exception to MRE 803(24) because MRE 803(24) is distinct from, and precedes, MRE 803A. Words in a court rule should be interpreted according to their everyday, plain meaning. People v Petit, 466 Mich 624, 627; 648 NW2d 193 (2002). "Foregoing" has been defined as "listed, mentioned, or occurring before." Webster's Ninth New Collegiate Dictionary, 1990, p 483. If this Court is to follow the unambiguous language of MRE 803(24), as defendant himself argues, then MRE 803(24) does not exclude a statement merely because it is arguably addressed by MRE 803A.[9]

This conclusion is bolstered by the language of MRE 803A itself. That rule provides: "If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule" (emphasis added). If possible, no part of a court rule should be considered surplusage. Grievance Administrator v Underwood, 462 Mich 188, 194; 612 NW2d 116 (2000). By including the words "under this rule," this Court made clear that the requirements for admissibility under MRE 803A

[9] The trial court made this point during a hearing on the prosecutor's motion (32a-33a), but did not use it as a basis for its ruling.

applied only to MRE 803A; they are not meant to exclude a statement from admission under another theory. Plainly, this Court recognized that a second or subsequent statement by a child declarant, although not admissible under the tender years exception, might well be admissible under another hearsay exception.[10]

B. Even if "foregoing exceptions" is construed to include MRE 803A, this Court should join the majority of federal circuits in rejecting the "near-miss" theory and hold that MRE 803A does not specifically cover Desi's statements to Bowman.

The language of MRE 803(24) is materially identical to that of FRE 807, the residual exception in the Federal Rules of Evidence.[11] Where a Michigan rule of evidence parallels a federal rule of evidence, this Court has sometimes found guidance in commentary and case law about the federal rule. People v VanderVliet, 444 Mich 52, 60 n 7; 508 NW2d 114 (1993); People v Poole, 444 Mich 151, 161; 506 NW2d 505 (1993). The Court of Appeals has done so in applying MRE 803(24). Katt, 248 Mich App at 290-291; People v Welch, 226 Mich App 461, 466; 574 NW2d 682 (1997).

The provision that a statement admitted under the federal residual exception should not be "specifically covered by any of the foregoing exceptions" has been interpreted in two general ways. Most federal circuits have held that a statement is "specifically covered" by another exception only if the statement satisfies all the requirements for admissibility under that exception. United States v Earles, 113 F3d 796, 800 (CA 8, 1997). The Sixth Circuit is one of many that has adopted this view:

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[10] Thus, defendant's criticism of the trial court's reliance on In re Snyder, supra (Defendant's Brief, 19) is of no consequence. The trial court did not need In re Snyder; MRE 803A itself authorizes consideration of other hearsay exceptions.

[11] Former FRE 803(24) and FRE 804(b)(5) were combined in 1997 to form FRE 807.

> [T]his court interprets [FRE 807], along with the majority of circuits, to mean that "if a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 807.03(4) (2d ed. 2000). We endorse the reasoning in [] *Earles*. . . . Therefore, the analysis of a hearsay statement should not end when a statement fails to qualify [under a firmly rooted hearsay exception], but should be evaluated under the residual hearsay exception. [United States v Laster, 258 F3d 525, 530 (CA 6, 2001) (footnotes omitted).]

There are authorities, however, that espouse what is sometimes called the "near-miss" rule. These courts say that if a statement is of a type addressed by another hearsay exception, but fails to qualify under that exception, it should not be admitted under the residual exception either. See, e.g., United States v Turner, 104 F3d 217, 221 (CA 8, 1997) (where no expert testimony established a medical text as authoritative as required by FRE 803(18), admission under former FRE 803(24) "would circumvent the general purposes of the rules").

The Court of Appeals rejected the near-miss theory with respect to MRE 803(24), agreeing with most of the federal courts that the approach followed in Laster and Earles "best serves the core purpose of the residual exception." Katt, supra, 248 Mich App at 290-294. There are several good reasons for agreeing with the Court of Appeals.

1. The majority approach better comports with the plain language of MRE 803(24).

Words in a court rule should be given their plain meaning. Petit, supra, 466 Mich at 627. The majority approach to interpreting the words "specifically covered" in the federal residual exceptions follows this principle. Under the majority approach, "specifically covered" means "exactly what it says: if a statement does not meet all of

the requirements for admissibility under one of the prior exceptions, then it is not 'specifically covered.'" United States v Clarke, 2 F3d 81, 83 (CA 4, 1993).

That the definition of "specific" supports the majority rule was expounded in Fenner, The residual exception to the hearsay rule: the complete treatment, 33 Creighton L Rev 265, 274-275 (2000):

> Specific is defined as "a: constituting or falling into a specifiable category b: sharing or being those properties of something that allow it to be referred to a particular category." [Quoting Merriam-Webster's Collegiate Dictionary, CD-ROM (Zane Publishing Company, 1996).] "Specifically covered" by one of the exceptions in [FRE] 803 or 804, then, seems to mean falling within one of those exceptions. It does not seem to mean falling outside the exception. No matter how close it came, a miss is still a miss. This seems to be the plain meaning of the rule, as written.
>
> That is, each exception has certain foundational elements, and if there is sufficient evidence of each foundational element for any one exception then the statement is "specifically covered" by the exception. It is specifically covered by this exception whether it fits under any other exception or not. And, if one of the foundational elements is missing, then it is not "specifically covered" by this exception – no matter how close it comes. In fact, in this latter situation, the statement is specifically not covered by the barely missed exception. [Footnotes omitted.]

Likewise, the meaning of the word "covered" favors the majority approach over the near-miss rule. In United States v Dent, 984 F2d 1453, 1465-1466 (CA 7, 1993), Judge Easterbrook, concurring, suggested that Congress intended to exclude "near misses" from consideration under the residual exceptions because Congress used the word "covered" instead of the word "admissible." This point was ably refuted in Robinson, From Fat Tony and Matty the Horse to the sad case of A.T.: defensive and offensive use of hearsay evidence in criminal cases, 32 Hous L Rev 895, 917 (1995):

> Judge Easterbrook's literalism, while ingenious, assumes both an unconvincing clarity and a peculiar meaning of "covered."[156] His complaint that the authors of the rule did not use the term "admissible" ignores the fact that the hearsay exceptions do not make evidence admissible. It may

be inadmissible under other rules (such as the relevancy rules), acts of Congress, or the Constitution.

[156] The Webster's dictionary lists 23 meanings of the term "cover," including "to have width or scope enough to include or embrace." Webster's Third New International Dictionary 524 (1986). It does not mean "is somewhat similar to," which seems to be the meaning ascribed by Judge Easterbrook to the rule's "specifically covered" language.

2. The majority approach better serves the purposes of the residual exceptions and the rules of evidence in general.

The purpose of hearsay exceptions is to permit the use of hearsay statements that possess "a sufficient inherent degree of reliability." People v LaLone, 432 Mich 103, 115; 437 NW2d 611 (1989) (Brickley, J.).[12] These exceptions are justified by the belief that the hearsay statements admitted under them are necessary and inherently trustworthy. People v Meeboer (After Remand), 439 Mich 310, 322; 484 NW2d 621 (1992). In determining the admissibility of hearsay evidence, then, the trial court's focus is to be on its reliability, not on its similarity to other types of evidence.

Moreover, the broad purpose of the rules of evidence is "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." MRE 102. The purpose of ascertaining truth and justly determining proceedings is best accomplished by focusing on whether evidence is reliable, not on its proximity to various, limited categories. In Clarke, supra, the Fourth Circuit considered the admissibility of testimony given by the defendant's brother at a suppression hearing. The testimony was inadmissible under FRE 804(b)(1) because

[12] Although Justice Brickley' opinion in LaLone was a plurality opinion, five Justices concurred in this portion of the opinion. 432 Mich at 117.

the defendant, against whom the testimony was offered, had no opportunity to develop the testimony. But the district court admitted the testimony under the residual hearsay exception found in former FRE 804(b)(5). Id. The Fourth Circuit stated:

> . . . . Appellant asks us to construe "not specifically covered" narrowly, limiting 804(b)(5) to cases in no way touched by one of the four prior exceptions. According to appellant, admitting testimony that was a "near miss" under 804(b)(1) would undermine the protections of the evidentiary rules, as well as violate the Sixth Amendment's Confrontation Clause.
>
> We disagree. Appellant's view of "not specifically covered" would effectively render 804(b)(5) a nullity. The plain meaning, and the purpose, of 804(b)(5) do not permit such a narrow reading. We believe that "specifically covered" means exactly what it says: if a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not "specifically covered." *United States v Fernandez*, 892 F2d 976, 981 (11th Cir. 1989). This reading is consistent with the purposes of 804(b)(5). That rule rejects formal categories in favor of a functional inquiry into trustworthiness, thus permitting the admission of statements that fail the strict requirements of the prior exceptions, but are nonetheless shown to be reliable. If we were to adopt appellant's reading of the rule, we would deprive the jury of probative evidence relevant to the jury's truth-seeking role. [Clarke, 2 F3d at 83.]

Indeed, one of the purposes of the residual exceptions is to allow trial courts to admit reliable, probative hearsay without distorting the more established hearsay exceptions. In United States v Popenas, 780 F2d 545, 546-548 (CA 6, 1985), the Sixth Circuit reviewed the district court's decision to exclude an affidavit from evidence. The affidavit was offered under former FRE 803(24), but the district court avoided analysis under that rule by holding that the affidavit was a prior inconsistent statement whose admissibility should be determined under FRE 801(d)(1). The parties acknowledged that the affidavit was hearsay under FRE 801(d)(1). The district court held that the limitations found in FRE 801(d)(1) were the sole guidelines for deciding the admissibility

of a witness' prior statement. Id., 547. The Sixth Circuit disagreed with this "broad reasoning":

> . . . . The validity of the residual exceptions to the hearsay rule was expressly addressed by Congress during its consideration of the Federal Rules of Evidence. The House Judiciary Committee deleted the residual exceptions, but the Senate Judiciary Committee reinstated them, fearing that without these provisions the more established exceptions would be unduly expanded in order to allow otherwise reliable evidence to be introduced. S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7065-66. The limitations contained in the current rule illustrate the undeniably restrictive nature of the exception, yet we feel the district court's approach would render it a nullity. This was not the intent of Congress. [780 F2d at 548 (citations omitted).]

As the Third Circuit observed in In re Japanese Electronic Products Antitrust Litigation, 723 F2d 238, 302 (CA 3, 1983), reversed on other grounds sub nom Matsushita Electric Industrial Co, Ltd v Zenith Radio Corp, 475 US 574; 106 S Ct 1348; 89 L Ed 2d 538 (1986), the near-miss theory "conflicts with the general function of [former FRE] 803(24) and 804(b)(5). Plainly stated, the theory puts the federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them."

3. The near-miss rule is illogical and unworkable, and would lead to absurd and perverse results.

The near-miss rule contains an unstated premise and conclusion: If statements that meet the requirements for admission under a given hearsay exception are considered trustworthy, then a statement that comes close to, but fails to meet, the requirements for admissibility of the established exception cannot possibly be trustworthy. More particularly, defendant claims that MRE 803A reflects a universal rule that all subsequent statements of a child about sexual abuse are inherently

untrustworthy. These arguments reflect a logical fallacy known as "assuming the converse;" they are akin to saying that if all robins qualify as birds, then a creature that looks very similar to a robin, but is not, cannot possibly be a bird.

The residual exceptions were adopted, both in the federal system and in Michigan, precisely because the conclusion defendant seeks to draw is false. Many statements are reliable for reasons that are case-specific, reasons which cannot be neatly summarized in a finite list of hearsay exceptions. Thus, the inquiry into reliability is fact-driven. United States v Trenkler, 61 F3d 45, 58 (CA 1, 1995).

Put another way, defendant's argument confuses "equivalent" with "identical." The very reason for the residual exceptions is that the circumstances that might guarantee the trustworthiness of some statements are not precisely identical to the circumstances that have been deemed to guarantee the trustworthiness of statements admissible under the firmly rooted exceptions. If a statement possesses circumstances identical to those under another exception, the residual exception would never come into play. See Clarke, supra, 2 F3d at 84 ("The guarantees [of the prior testimony at issue, offered under a residual exception] are not identical to those in 804(b)(1), but they are in their totality equivalent, which is what the language of 804(b)(5) requires").

Defendant's proposed interpretation, if accepted, would also create horribly murky, if not unsolvable, problems for trial judges because it would blur the scope of the residual exceptions. Defendant's definition of "specifically covered" is derived from Professor Randolph Jonakait, who states that hearsay is "covered" by an established hearsay rule if it is "within [the] Rule's ambit." Jonakait, The subversion of the hearsay

rule, 36 Case W Res L Rev 431, 462 (1986) (Defendant's Brief, 22). This definition is circular and meaningless.

Similarly, in Turner, supra, 104 F3d at 221, the Court implied that a hearsay exception "covers" a given statement if it deals with the admissibility of that "type" of evidence. The problem is that one can argue that any statement is of a type generally addressed by one or more of the established hearsay exceptions. The exception for present sense impressions under MRE 803(1), for example, could be construed to "cover" every "statement describing or explaining an event or condition."[13] The exception for records of regularly conducted activity under MRE 803(6) could be read to "cover" every "memorandum, report, record, or data compilation . . . of acts, transactions, occurrences, events, conditions, opinions, or diagnoses." Depending on the whim of the judge, MRE 803(16) might "cover" only "a document in existence twenty years or more" – or it might cover every "document in existence." Similar hypotheticals could be imagined for many of the established hearsay exceptions.

The Fourth Circuit stated the problem well:

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[13] See Majors, Admitting 'near misses' under the residual hearsay exception, 66 Or L Rev 599, 621 (1987):

> Indeed, since almost any assertion made in reaction to some event is arguably 'a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter' a colorable argument for the application of Rule 803(1) attaches to a fairly high percentage of hearsay statements.
>
> It follows that the number of near misses under Rule 803(1) is arguably considerable. Therefore, any per se rule disallowing consideration under Rule 803(24) of any proffered hearsay that narrowly misses under Rule 803(1) would cut a swath so wide as to leave little room for the residual rule. Disallowing such near misses would effectively nullify Rule 803(24). [Footnote omitted.]

> The doctrine that a "near miss" under a specified exception somehow renders evidence inadmissible under a residual exception promises much litigation over how close a statement can come to one of the specified exceptions before it is rendered inadmissible under 804(b)(5) as well. We think that this litigiousness is contrary to the inquiry established by the residual exception, which focuses on whether the statement has "equivalent circumstantial guarantees of trustworthiness." Both litigants and courts spend their time more productively in analyzing the trustworthiness of the particular statement, rather than debating the abstract question of "How close is too close?" to a specified hearsay exception. . . . To adopt the "near miss" theory would create an odd situation where testimony that was equally trustworthy would be distinguishable based merely on its proximity to a specified exception. . . . [Clarke, supra, 2 F3d at 84.]

Indeed, the current case illustrates that the near-miss rule is too vague to be applied fairly and consistently. Defendant maintains that MRE 803A "covers" Desi's statements to Bowman because they are statements "describing an incident that included a sexual act performed with or on the declarant by the defendant." MRE 803A. But a statement is only admissible under this rule "to the extent that it corroborates testimony given by the declarant during the same proceeding." Id. Desi's statements to Bowman provided much more detail than his trial testimony. Are those details not "covered" by MRE 803A? Further, MRE 803A lists four more requirements for admissibility. Suppose a ten-year-old child makes a statement about the defendant's sexual abuse. Since the child is ten years old, not under the age of ten, the statement would not be admissible under MRE 803A(1). Defendant would doubtless say that this is an absolute indication that the statement cannot be admitted under the residual exceptions, regardless of how reliable it might be. But might one not just as well say that MRE 803A only "covers" statements from younger children?

In each of these scenarios, common sense and reliability would be ignored under the near-miss rule, and the debate would center instead on semantics and generalities.

The proponent of the statement would argue, perversely, that the statement was utterly unlike anything that had ever been accepted as reliable hearsay before. The opponent would argue, equally perversely, that the statement was somewhat like other hearsay previously established as reliable – and that therefore, the trial court should simply exclude the statement without examining its reliability.

Under defendant's proposed interpretation, the residual exceptions either would never be viable or, if they were, would be so arbitrarily applied that the goals of fairness and justice laid down in MRE 102 would be lost. As the Third Circuit said in rejecting the near-miss theory,

> Without doubt the exceptions were not intended to have broad application. This does not warrant, however, the creation of some new theory of limitation that seems more to complicate matters than to resolve them. [In re Japanese Electronic Products Litigation, supra, 723 F2d at 302-303.]

The answer to these concerns is rejection of the near-miss rule in favor of the common sense approach taken by the majority of federal circuits and by our own Court of Appeals. Under this approach, the residual exceptions are not dependent on the other hearsay exceptions. A trial judge need not wonder whether a given statement is "too close" to another exception to be a candidate for admission under a residual exception. Instead, the judge focuses on the stringent requirements of the residual requirements themselves. In particular, the judge determines whether the statement contains circumstantial guarantees of trustworthiness that are equivalent to those reflected in the other hearsay exceptions.

C. Desi's statements contained circumstantial guarantees of trustworthiness equivalent to those reflected in the other hearsay exceptions.

In addition to the provision that a statement offered under MRE 803(24) should not be specifically covered by another exception, MRE 803(24) contains several other requirements for admissibility. Some of them are not disputed here. Specifically, defendant makes no claim that Desi's statements were not offered as evidence of a material fact[14] or that defendant received insufficient notice of the People's intent to offer Desi's statements under MRE 803(24). The trial court and the Court of Appeals correctly found that the statements met the remaining three requirements for admission, and this Court should affirm those decisions.

As noted in the statement of facts, defendant stipulated to the trustworthiness of Desi's statements under MRE 803(24) (44a-46a). Should this Court choose to address the issue anyway, the People submit that Desi's statements to Bowman abounded with guarantees of trustworthiness.

In determining whether a statement possesses "particularized guarantees of trustworthiness" under the federal residual exception, "the trial court must examine the totality of the circumstances surrounding the making of the statement and those rendering the declarant particularly worthy of belief." United States v Barrett, 8 F3d 1296, 1300 (CA 8, 1993). In Trenkler, supra, 61 F3d at 58, the First Circuit explained that the trustworthiness requirement

> "is largely fact driven, and its focus will vary depending on the context in which the issue arises. A court, however, may consider whether the evidence shares reliability factors (e.g., personal knowledge, lack of bias)

[14] In any event, this criterion is merely "a restatement of the general requirement that evidence must be relevant," and has had "no appreciable impact upon the application of the residual exception." McCormick on Evidence, 4th ed, 1992, § 324.

> common to the other hearsay exceptions and whether the evidence, but for a technicality, would otherwise come within a specific exception. . . ."

Barrett involved a child's hearsay statements about her mother's abuse. The Eighth Circuit found the following to be appropriate factors for consideration regarding the trustworthiness of the statements: "(1) the spontaneity of the statement, (2) the consistent repetition of the statement, (3) the child's lack of a motive to fabricate, and, (4) the reason for the child's inability to testify at trial." Barrett, supra, 8 F3d at 1300.

Other federal courts have considered numerous factors, including the ones noted in Barrett. The tender age of the victim indicates reliability, since the victim is less likely to maliciously fabricate. United States v Renville, 779 F2d 430, 441 (CA 8, 1985); United States v Farley, 992 F2d 1122, 1126 (CA 10, 1993). The victim's testimony at trial and subjection to cross-examination is a significant indication of the reliability of the out-of-court statement; it "vitiates the main concern of the hearsay rule, which is the lack of any opportunity for the adversary to cross-examine the absent declarant." Renville, supra, 779 F2d at 440; United States v Grooms, 978 F2d 425, 427-428 (CA 8, 1992).

Other considerations supporting reliability include other consistent statements by the victim, United States v Cree, 778 F2d 474, 477 (CA 8, 1985); United States v Tome, 61 F3d 1446, 1452-1453 (CA 10, 1995), citing Idaho v Wright, 497 US 805, 821; 110 S Ct 3139, 3150; 111 L Ed 2d 638 (1990); the fact that the statement was made to someone trained to interview children, United States v Dorian, 803 F2d 1439, 1444 (CA 8, 1986); the use of open-ended rather than leading questions, United States v NB, 59 F3d 771, 776 (CA 8, 1995); United States v George, 960 F2d 97, 100 (CA 9, 1992); the victim's use of age-appropriate language, NB, supra, 59 F3d at 777; Tome, supra, 61 F3d at 1453; and a short time lapse between the abuse and the statement, NB,

supra, 59 F3d at 776; Farley, supra, 992 F2d at 1126. Courts have considerable leeway in their consideration of appropriate factors, George, supra, 60 F2d at 100, quoting Wright, supra, 110 S Ct at 3150, and no single factor is dispositive, NB, supra, 59 F3d at 776. Finally, Congress' reference in FRE 803(24) to guarantees of trustworthiness equivalent to those in the other exceptions strongly suggests that almost fitting within one of them cuts in favor of admission. . ." United States v Valdez-Soto, 31 F3d 1467, 1471 (CA 9, 1994); accord, Trenkler, supra, 61 F3d at 58.

This Court has adopted many of these factors in the closely related context of determining the trustworthiness of a child's statement for the purposes of medical treatment under MRE 803(4). In Meeboer, supra, 439 Mich at 324-325, this Court listed ten factors for consideration. Among them were the age and maturity of the declarant, the manner in which the statements were elicited (leading questions weigh against admissibility), the manner in which the statements were phrased (childlike terminology might indicate genuineness), the use of terminology unexpected in a child of similar age, and the existence or nonexistence of a motive to fabricate. Id.

In this case, Desi's statements to Bowman showed many of the indicia of reliability mentioned above. The statements were spontaneously made, and Desi used age-appropriate language. The statements were made to someone who was qualified to interview children and who avoided leading questions. Desi's account remained consistent throughout the interview with Bowman. Although there were variations between Desi's statements to Bowman and his testimony at trial, they were essentially consistent. Desi's testifying at trial meant that the main concern of the hearsay rule –

the lack of opportunity for cross-examination – was not an issue. Renville, supra, 729 F2d at 440.

Additionally, Desi's tender age made it less likely that he would maliciously fabricate his account. Indeed, defendant specifically disavowed any claim that either child had made up the allegations (59b-60b). Instead, defendant claimed that Grissom had coerced the children into making the allegations. But no evidence of that was ever introduced – only evidence that (1) Grissom had a motive for revenge against defendant, and (2) Grissom had physically abused the children. Not only Grissom, but both children denied any connection between these facts. Similarly, despite defendant's assertions about the possible influence of an adult listener on a child's later statements (Defendant's Brief, 28-30), the record contains no hint that any such influence occurred in this case. Indeed, the fact that Grissom told Bowman she did not believe the allegations against defendant (51a; 46b) is strong evidence that she did not contribute to Desi's statements to Bowman in any way.

D. The statements were more probative on the point for which they were offered than any other evidence the People could have procured through reasonable efforts.

Factors supporting a finding that a hearsay statement is the most probative evidence of a point under the federal residual exception include the fact that the statement contained details the victim could not provide at trial, United States v Shaw, 824 F2d 601, 610 (CA 8, 1987), vacated on other grounds 24 F3d 1040 (CA 8, 1994) (this factor was "most important[]"); Grooms, supra, 978 F2d at 427, and the proximity in time of the statement to the abuse, Shaw, supra, 824 F2d at 610. Moreover, even

where the out-of-court statement is somewhat cumulative, "'it may be important in evaluating other evidence and arriving at the truth so that the "more probative" requirement can not be interpreted with cast iron rigidity.'" Id., quoting 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(24)[01], at 803-379 (1985).

Contrary to defendant's claim, Desi's statements to Bowman were more probative than his statement to Grissom.[15] The trial court found only that Desi had told Grissom that defendant had sucked on his "pee-pee" (54a). The prosecutor had stated – presumably relying on police reports to which both parties had access – that this was all Desi had said (30b). Defendant never disputed this below. His belated suggestion that Desi may have given a much more detailed, probative statement to Grissom, which the prosecutor simply failed to discover, finds no support in the record.

Defendant claims that Desi's statements to Bowman were made "much longer after the incident allegedly occurred" (Defendant's Brief, 33). In fact, they occurred only three days after Grissom questioned Desi (28a).

Moreover, even if Desi's statement to Grissom had been more probative, the People could not have procured it for use at trial. The prosecutor acknowledged that the statement Desi made to Grissom was not spontaneous, but was the result of questioning (48b-49b, 51b-52b). Since MRE 803A, the so-called "tender years" exception to the hearsay rule, requires that a proffered statement be spontaneous, the

[15] On appeal, defendant has never claimed that Desi's or Amanda's trial testimony was more probative than Desi's statements to Bowman. Katt, supra, 248 Mich App at 299.

prosecutor conceded that such statements were inadmissible under MRE 803A. Id. Defendant never challenged this point in the trial court.

E. Admission of the statements best served the general purposes of the rules of evidence and the interests of justice.

Defendant does not actually cite this criterion as a basis for excluding Desi's statements, but the People briefly address it anyway because it is closely related to the other criteria and to defendant's arguments.

The Ninth Circuit has said that this requirement is "simply a further emphasis upon the showing of necessity and reliability and a caution that the hearsay rule should not be lightly disregarded." United States v Friedman, 593 F2d 109, 119 (CA 9, 1979). Another court has lamented that the "best interests of justice" requirement "is so abstruse in formulation as to constitute little guidance for the court. Perhaps a better statement of this consideration . . . is that the rules on hearsay should be read to exclude unreliable hearsay but to admit reliable hearsay." In re Drake, 786 F Supp 229, 234 (EDNY, 1992). By these standards, Desi's statements to Bowman were properly admitted. As argued above, they were reliable and constituted the most probative evidence the People could introduce about the details of defendant's crimes.

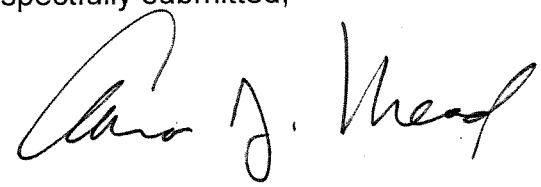
The Michigan Rules of Evidence themselves also provide some guidance. As stated, rules are intended to "promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." MRE 102. Because Desi's statements to Bowman were extremely reliable and highly probative, placing them into evidence helped the jury ascertain the truth.

REQUEST FOR RELIEF

For these reasons, defendant's convictions should be affirmed.

DATED: 11/15/02

Respectfully submitted,



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